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September 24, 1998

VIA OVERNIGHT DELIVERY
Ms. Magalie Roman-Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: GST Telecom Inc.'s Comments on the Notice of Proposed Rulemaking in CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability

Enclosed please find an original and five copies of GST Telecom Inc.'s comments on the Notice of Proposed Rulemaking in the above-captioned matter.

Please date stamp and return the additional fifth copy of each filing in the postage paid return envelope. Should you have any questions concerning this filing, please direct them to the undersigned at 360-356-7104.

Sincerely,

Barry Pineles

Barry Pineles
Regulatory Counsel for GST Telecom Inc.

Enclosures

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List A B C D E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

COMMENTS OF GST TELECOM INC. ON THE NOTICE OF PROPOSED RULEMAKING

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September 25, 1998

Executive Summary

On August 7, 1998, the Federal Communications Commission ("FCC") issued a memorandum opinion and order rejecting requests from the Regional Bell Operating Companies ("RBOCs") to permit them to offer in-region InterLATA data services. At the same, the FCC issued a notice of proposed rulemaking ("NPRM") that suggested an alternative mechanism for the RBOCs and other ILECs to offer advanced data services through unregulated CLEC subsidiaries. The NPRM also proposes enhancements to the FCC rules concerning collocation and access to unbundled network elements, particularly unbundled local loops and sub-loop elements, that will enhance competition.

GST is a facilities-based competitive local exchange carrier that relies on interconnection and access to unbundled network elements to provide competitive local exchange service and exchange access service in ten states and the Commonwealth of the Northern Marianas Islands. For purposes of federal government contracting as well as the Regulatory Flexibility Act (which requires federal agencies to analyze the impact of their rules on small businesses and minimize those adverse effects), GST is a small business.

The outcome of this rulemaking is critical to GST and other CLECs. As a small business competitor of the ILECs, GST is concerned that ILEC entry, particularly through an unregulated subsidiary, poses grave threats to emerging competition in the data transmission market. Nor does GST believe that the FCC efforts to further enhance competition, which GST strongly supports, will ameliorate GST's concerns about the adverse effects that unregulated ILEC subsidiaries will have on competition, especially the smaller competitors of the ILECs.

GST does not believe that the FCC has the legal authority to allow ILECs in general, and RBOCs, in particular, to establish unregulated subsidiaries. GST supports the full

legal analysis of this issue undertaken by the Association for Local Telecommunication Services.

GST also opines that there are sound policy considerations for not authorizing ILEC establishment of affiliated CLEC subsidiaries. No matter how much structural separation the FCC mandates, the simple fact of the matter is that any transaction between the ILEC and its CLEC affiliate remains an intracorporate transfer that does not affect the bottom line of the corporate parent. A non-discriminatory price charged to the affiliated CLEC and GST would not affect the ability of the affiliated CLEC to offer a service at a competitive rate (any economic losses redound ultimately to the parent corporation). However, that same rate could prevent GST from offering data transmission services at a competitive rate without potentially absorbing significant financial losses. Ultimately, this could affect GST's ability to raise capital threatening its longtime survival and thereby lessening rather than enhancing competition. When faced with the same potential debilitating effects on competition in the cable television market, the FCC barred franchised cable operators from establishing open video systems in their franchised territory until they faced effective competition. GST believes that rationale applies with equal force to ILEC establishment of CLEC subsidiaries.

If the FCC decides to permit affiliated CLEC subsidiaries, GST has the following recommendations to ensure that they do not adversely affect competition. First, the structural separation rules must apply to all ILECs, not just the RBOCs. Second, the FCC should ensure that intracorporate transactions are reviewed by mandating that ILECs file tariffs or contracts for services rendered to the affiliated CLEC. Third, affiliated CLECs cannot have preferential access to operating support systems or information concerning which local loops are DSL-qualified. Fourth, the FCC must mandate that ILECs reopen their interconnection agreements to ensure that

their affiliated CLECs are not negotiating new interconnection agreements that incorporate new collocation standards and packet-switching while unaffiliated CLECs must wait for the expiration of their existing agreements to benefit from the new standards for service offerings, collocation, and unbundling. Finally, GST recommends that the FCC impose open network architecture requirements on all ILECs that would make network planning transparent for all CLECs and not prevent affiliated CLECs from gaining a competitive advantage through insider knowledge of network changes.

GST, like all CLECs, has experienced and continues to experience difficulty in physically collocating its equipment at the ILEC central office. GST strongly supports the FCC's efforts to improve the collocation process. In particular, GST recommends that the FCC permit sharing of collocation cages, prohibit minimum sizes for collocation cages, prevent ILECs through their CLEC affiliates from reserving too much space in the central office thereby prohibiting unaffiliated CLECs from obtaining space to physically collocate, and authorize cageless collocation. Finally, GST believes that these rules should be enforceable at either the FCC or the state commission whichever would permit speedier adjudication.

GST has an extensive facilities-based network. Yet, GST, like other CLECs, cannot hope to match the ubiquity of the ILEC network in the foreseeable future. To remedy this problem and ensure the development of competition in the local market, Congress and the FCC authorized CLECs to gain non-discriminatory access to the unbundled local loop of the ILEC. For GST to effectively compete in the DSL market, it must have non-discriminatory access to DSL-qualified unbundled loops. But access to the unbundled loop is not a sufficient precursor to effective competition. Efficient network engineering and development require that GST have

access to the digital subscriber line access multiplexer ("DSLAM") at remote concentration devices. More important, GST also must have access to the multiplexer or other equipment located at the ILEC central office through which it provides DSL service. This would be the most efficient mechanism for GST to interconnect its fiber optic network in order to provide DSL, a metallic-based service.

Unbundled non-discriminatory access also means that GST has the same right to control the unbundled loops that it purchases from the ILEC that the ILEC itself has. Thus, GST must be given the right to resell DSL service, the unbundled loops, permit other CLECs to share the frequencies, and otherwise manage the loop in the most beneficial manner to GST.

GST recognizes that there are technological problems associated with DSL service. GST recommends that crosstalk problems be eliminated through power limitations rather than spacing requirements in conduits. The latter alternative raises the possibility that the ILEC or its would be able to limit the ability of other CLECs to offer high-quality DSL service.

GST, as a carrier with fewer legal and technical resources than its ILEC competitors, cannot analyze all the permutations and combinations that the FCC may consider in finalizing its rules. To comply with the Congressional mandate to ensure participation by small businesses in federal agency rulemakings, the FCC should issue a further notice of proposed rulemaking so GST has the opportunity to educate it on the impact of specific regulatory standards.

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BEFORE THE
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WASHINGTON, DC 20554

In the Matter of	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

COMMENTS OF GST TELECOM INC.
ON THE NOTICE OF PROPOSED RULEMAKING

On August 7, 1998, the Federal Communications Commission ("FCC") released the above-captioned Notice of Proposed Rulemaking ("NPRM") to consider the conditions under which incumbent local exchange carriers ("ILECs") could provide advanced data services pursuant to § 706 of the Telecommunications Act of 1996 ("Telecommunications Act").[1] The FCC also proposes to modify its interconnection requirements, adopted pursuant to § 251 of the Telecommunications Act, in order to increase competition for exchange service and exchange access service as may be necessary to promote effective and full competition in the advanced data services market. GST Telecom Inc. ("GST"), a competitive local exchange carrier ("CLEC"), believes this is one of the most important rulemakings undertaken by the FCC since

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[1] Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 706).

the adoption of the rules governing local competition[2] and represents a unique opportunity to utilize the tools authorized by Congress in the Telecommunications Act to ensure procompetitive conditions in the fastest growing segment of the telecommunications marketplace. GST is concerned, however, that full implementation of the proposed rules, as drafted, could have unintended long-term consequences affecting the ability of CLECs, such as GST, to establish themselves in the telecommunications market before the FCC authorizes the creation of ILEC unregulated CLECs. While GST is not sanguine about the benefits of the FCC's proposal for separate subsidiaries, it fully endorses the efforts to improve the interconnection process and the unbundling of local loops for the provision of advanced data services. These modifications will enhance competition for plain old telephone service as well as advanced data services. And the development of a competitive market is the chief objective of the Telecommunications Act.

I. GST and its Interest in this Rulemaking

GST has certificates of public convenience and necessity to operate as a CLEC in: Arizona, California, Hawaii, Idaho, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and the Commonwealth of the Northern Marianas Islands. As a facilities-based CLEC, GST operates state-of-the-art, digital telecommunications networks that provide an alternative to the ILEC. GST offers a full line of integrated telecommunications products and services, including exchange service, exchange access service, interexchange service, special access services, and

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499 (1996) ("Local Competition Order").

Internet and other data transmission services. In an effort to meet the needs of customers with intensive data transmission requirements, GST is currently implementing a Virtual Integrated Transport and Access network utilizing packet switching and frame relays.

GST currently serves 41 markets in those jurisdictions where it operates as a CLEC.[3] GST also constructs, markets, and manages long-haul fiber optic facilities in Arizona, California, and Hawaii. GST's total long-haul fiber optic facilities extend over 1,300 miles and another 1,800 route miles are under construction to become operational within the year. All this in its brief four year history despite the obstacles placed in front of it by ILECs.

Despite the breadth of this network, GST remains a small, entrepreneurial telecommunications company and is considered a small business under the Small Business Act[4] and the Regulatory Flexibility Act ("RFA").[5] In implementing the Small Business Act, the United States Small Business Administration has determined that wireline telephone companies with less than 1,500 employees qualify as "small."[6] The FCC has adopted this definition for

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[3] GST also is authorized to provide interexchange service in 46 states and the District of Columbia.

[4] 15 U.S.C. § 632.

[5] 5 U.S.C. § 601.

[6] 13 C.F.R. § 121.201.

purposes of complying with the RFA.[7] GST, as of June 30, 1998, had 1,367 employees and therefore qualifies as a small business.

As a CLEC, GST is dependent, in part, on ILECs for provision of competitive local telephone services through access to local loops, call termination services, and access to sufficient capacity in the central office switches of ILECs. GST, pursuant to § 251(c) of the Telecommunications Act, has entered into interconnection agreements with US West, GTE, Pacific Bell, and Southwestern Bell. Like all CLECs with first generation interconnection agreements, GST routinely experiences difficulties with basic ILEC obligations regarding collocation, timely provisioning of interconnection trunks and multiplexer equipment, loading and testing of NXXs, and interfacing with ILEC operational support systems ("OSS"). Unfortunately, often what is written on paper is not delivered in actuality.

The NPRM has two significant components. One addresses remedies to the problems faced by GST in obtaining interconnection with ILECs. GST strongly supports all efforts of the Commission to improve the interconnection process, particularly in dispute

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[7] The RFA requires that a federal agency adopt the small business definition developed by the Small Business Administration unless the agency develops a different standard, seeks notice and comment of the new size limit, and consults with the Chief Counsel for Advocacy of the United States Small Business Administration. 5 U.S.C. § 601. The FCC has not chosen the latter course and utilizes the Small Business Administration's definition for purposes of compliance with the RFA. NPRM at ¶ 224.

The RFA requires that the FCC determine whether a proposed rule would have a significant economic impact upon a substantial number of small entities and, if it does, examine alternatives that will lessen the impact on those businesses. *See Value Vision Int'l v. FCC*, No. 98-1137, slip op. at 14-16 (D.C. Cir. July 24, 1998).

resolution and in anticipation of future obstacles to the development of a competitive market. In this regard, given GST's experience with interconnection difficulties that it still experiences today on a routine basis, any improvements to the rules concerning collocation and unbundling of loops must be as specific as possible. Otherwise, ambiguity and imprecision gives the ILECs the opportunity to deny, delay or litigate GST's interconnection requests. The other aspect of the NPRM addresses the conditions under which ILECs will be able to offer advanced data services under the Telecommunications Act. As a small business competitor of the ILECs, GST is concerned that ILEC entry, particularly through an unregulated subsidiary, poses grave threats to emerging competition in the data transmission market.

II. Statutory Framework

The Telecommunications Act requires that all telecommunications carriers permit interconnection to their networks by other carriers.[8] The FCC has determined that this obligation is substantially less stringent than the interconnection obligations of ILECs.[9] For nondominant carriers, such as GST, the interconnection requirement may be met through indirect connections.[10]

The interconnection obligations of ILECs are far more encompassing. Under § 251(c), ILECs are required to: a) negotiate in good faith interconnection agreements with

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8 47 U.S.C. § 251(a).

9 *Local Competition Order*, 11 FCC Rcd at 15,991.

10 *Id.*

competing carriers; b) provide for direct interconnection with the ILEC network through collocation of facilities; c) provide for unbundling of network elements needed to provide service; d) permit resale of service at avoided cost;[11] and e) provide reasonable notice of changes that would affect the interoperability of interconnecting carriers.

While these obligations apply to all ILECs, they are particularly significant to the RBOCs. The Telecommunications Act prohibits the RBOCs from providing in-region InterLATA service until the FCC determines that the RBOC satisfies a 14-point checklist (which mirrors the obligations of interconnection) and that its provision of in-region InterLATA service would be in the public interest.[12]

The NPRM was initiated, in part, as a response to RBOC requests to provide advanced data services pursuant to § 706 of the Telecommunications Act.[13] Each of the RBOCs requested that the FCC forbear or take other regulatory steps that would enable them to offer in-

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[11] An ILEC's wholesale rate is based on the costs it does not incur to provide service at the retail level, such as billing, collection, advertising, customer premise installation, etc.

[12] 47 U.S.C. § 271.

[13] Section 706(a) provides, in pertinent part:

> The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans by utilizing ... regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

region InterLATA services for the purposes of providing advanced data transmission services, particularly digital subscriber line services ("DSL").[14] In short, the RBOCs requested that the FCC authorize them to provide service irrespective of whether they have met the tests set out in § 271 or their interconnection obligations under § 251(c) .

In an opinion issued coetaneous with the NPRM, the FCC rejected the RBOCs requests for various exemptions from §§ 251 and 271 in order to provide advanced data services. The FCC concluded that it does not have the authority to forbear from regulating RBOCs pursuant to these sections until such time as a competitive market exists in local telecommunication services.[15]

III. The NPRM

The Commission denied the petitions of the RBOCs but issued the instant NPRM to investigate the conditions under which all ILECs and, particularly the RBOCs, could offer advanced data services.[16] The Commission proposes that ILECs be permitted to establish CLEC

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[14] DSL covers a range of technologies which enable normal twisted-pair telephone lines to accommodate high-capacity bandwidth signals that those lines would otherwise be incapable of transmitting.

[15] *Petitions of Bell Atlantic Corp.*, CC Docket No. 98-11; *US West Communications, Inc.*, CC Docket No. 98-26; *Ameritech Corp.*, CC Docket No. 98-32; *Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell*, CC Docket No. 98-91, and *Association for Local Telecommunication Services*, CC Docket No. 98-78, Memorandum Opinion and Order, FCC 98-188, slip op. at 8 (Rel. Aug. 7, 1998).

[16] NPRM at ¶ 83.

subsidiaries which would not be subject to regulation as ILECs.[17] These CLEC affiliates would not be subject to the same interconnection requirements as their ILEC parents. The FCC expects to avoid potential cross-subsidization and parent-corporate subsidiary favoritism by requiring the CLEC affiliate to operate independently of the ILEC parent under a regulatory regime similar to, and in some ways, stricter than that set out in the *Non-Accounting Safeguards Order*.[18]

The FCC appears to recognize that granting ILECs, and in particular the RBOCs, the authority to establish in-region CLECs that are unbridled by regulation could decrease potential competition in the local exchange market. To counter that possibility, the FCC proposes a host of changes to its rules regarding collocation of equipment in ILEC central offices[19] and the establishment of new rules concerning the availability of unbundled loops, especially those that are DSL-qualified.[20] The FCC also requests comments on whether advanced services, such as DSL, should be subject to the resale obligations of the Telecommunications Act.[21] Finally, the FCC requests comments on what, if any, LATA

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17 *Id.* at ¶ 85.

18 *Id.* at ¶¶ 95-117; *see Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 (1996) ("Non-Accounting Safeguards Order").

19 NPRM at ¶¶ 119-50.

20 *Id.* at ¶¶ 151-84.

21 *Id.* at ¶¶ 185-89.

boundary modifications or relief it should undertake to permit the RBOCs' CLEC affiliates to provide in-region InterLATA service.[22]

IV. The Telecommunications Act Triad – Competition, Equality, and Quality

GST views this proceeding as an effort to improve the triad associated with the Telecommunications Act – providing customers with quality service through increased competition while ensuring that ILECs (and especially RBOCs) do not have any substantive competitive advantages arising from their prior status as monopoly-service providers. GST strongly supports all FCC efforts that enhance this triad. GST opines that the changes suggested in these comments will further enhance the competitive capabilities of CLECs, ensure equal treatment of all telecommunication service providers, increase the quality of telecommunications services (particularly high-speed access to the Internet) to all Americans, and reduce burdens on small businesses.[23]

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[22] *Id.* at ¶¶ 190-96. For the sake of brevity, GST supports the position of the Association for Local Telecommunication Services ("ALTS") concerning LATA boundary modifications.

[23] GST is not filing separate comments, as required by FCC procedure, on the initial regulatory flexibility analysis mandated by the RFA. One of the primary purposes of the RFA is to increase small business participation in federal agency rulemakings. 5 U.S.C. § 609; *see infra* Part VIII. However, the FCC, in an effort to reduce its own burdens, requires separate comments on the initial regulatory flexibility analysis. Thus, the FCC, in carrying out its statutory mission to reduce regulatory burdens on small business, actually imposes a more burdensome reporting requirement on small carriers, such as GST, than it does on SBC or Bell Atlantic. Those entities are only required to make one filing while GST, should it wish to comment on the initial regulatory flexibility analysis and the rulemaking, must prepare two separate filings. The irony of that situation needs no further expatiation. GST recognizes that this is not the appropriate

(continued...)

V. The FCC's Proposal for Establishment of Structurally Separate Subsidiaries will not Promote Deployment of Advanced Services while Ensuring Full Competition

The basic relief that the FCC proposes to grant RBOCs and other ILECs is the ability to create affiliated CLECs for operation in their service territories under a regime similar to that set forth in the FCC's *Non-Accounting Safeguards Order*.[24] Under the FCC's proposal, these CLEC affiliates would be just like any other CLEC affiliate, unregulated, allowed to provide in-region InterLATA service, and obtain interconnection, unbundled network elements, and collocation from the ILEC parent.[25] The FCC apparently accepts the arguments of the RBOCs that if they are released from regulation they will be more than willing to provide these advanced services.[26]

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[23](...continued)
proceeding to address these procedural requirements and will attempt to remedy this situation in another forum.

[24] Transactions between a structurally separate affiliate and the RBOC are governed by the rules set forth in the *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, FCC 96-490, slip op. (Rel. Dec. 24, 1996) ("Accounting Safeguards Order"). *See Non-Accounting Safeguards Order* at ¶ 181.

[25] NPRM at ¶ 85.

[26] And yet another plaintive cry goes up from the RBOCs to free themselves from the shackles of regulation and behold the telecommunications wonders that will befall the citizens of the United States if they are so released. This "woe is me" tale from the RBOCs with promises of future delights represents a continuing RBOC saga. Yet, despite capitulation from policymakers, RBOC promises remain unfulfilled. Just ask any Bell Atlantic customer in Manhattan attempting to use the brand new 56K modem on his or her computer; what they get is download speeds no faster than 26.4 kbps. Bell Atlantic's response is buy expensive ISDN service or suffer with the slow speeds. R. Fixmer, *Phone Companies Create Traffic Jam on*
(continued...)

GST has four primary problems with the FCC's conclusion. First, the FCC does not have the legal authority to authorize the establishment of separate RBOC or other ILEC data subsidiaries pursuant to §§ 272 and 251(h).[27] Second, structurally separate subsidiaries will not prevent anticompetitive behavior. Third, recognition of this anticompetitive behavior and application of the FCC's open video system rules militate against the establishment of ILEC-affiliated CLECs. Third, to the extent that rules are established for structurally separate subsidiaries, identically tough rules on separation must apply to all ILECs -- not just the RBOCs. Finally, GST opines that the FCC's proposal on structuring the affiliate relationship does not provide sufficient protection to ensure equality between ILEC-affiliated CLECs and independent CLECs and therefore, would be counterproductive to the development of a effectively competitive market for advanced data services; a result directly counter to the intent of the Telecommunications Act.

A. Structurally Separate Subsidiaries Do Not Create Level Playing Fields for All CLECs

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[26](...continued)
Road to Internet, N.Y. Times B10 (Sept. 1, 1998). Despite Bell Atlantic's inability to provide customers with adequate service under current technology, it must be free from regulation to provide advanced services. GST suggests that RBOCs first comply with their current obligations to customers and CLECs before taking on new responsibilities that leave existing customers languishing in the slow lane of the information superhighway.

[27] For the sake of brevity, GST will not reiterate arguments of others in this proceeding who will address the legality of the FCC's proposal. GST fully concurs with the legal analysis proffered by ALTS filed in response to the NPRM.

The FCC tentatively concludes that its structural separation rules will prevent improper discrimination against independent CLECs and improper cost allocation between the affiliate and the ILEC parent.[28] This conclusion misses the point concerning structurally separate subsidiaries. They remain part of the same parent corporate entity -- the ILEC that dominates the local telephony market.

The FCC's emphasis is on theoretical fairness. Yet, the FCC fails to consider that an affiliated-CLEC payment for a service from an ILEC constitutes nothing but an intracorporate transfer which cancels itself out on the books of the corporate parent. In contrast, non-affiliated CLECs' payments for services to an ILEC is a real cost on their books and bottom line. In turn, this could adversely affect the ability of the CLECs to attract equity or low-cost debt financing, or even providing the service at competitive rates. The end-result would be lessening competition in the marketplace not enhancing it as mandated by the Telecommunications Act.

Consider the following example. Effective provision of DSL service requires copper wire lines that are free of amplifiers, bridge taps, remote concentrators and other types of electronics. Steps taken to remove these impediments are routinely referred to as loop qualification. Assume that DSL loop qualification costs the ILEC $100 per 1,000 feet of line. If the ILEC affiliate charges $100 to its CLEC affiliate, the corporate parent absorbs a $100 cost but receives a $100 payment from the affiliate so the net effect on the consolidated parent's bottom line is, effectively, zero. In contradistinction, the $100 charge to GST from an ILEC

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[28] NPRM at ¶ 97.

represents a cost to GST and a $100 revenue gain to the ILEC corporate parent. If this cost is sufficiently high, GST will not be able to provide DSL service on a competitive basis. No amount of structural separation rules can overcome this competitive advantage to the ILEC.

Other problems exist as well. Under the *Non-Accounting Safeguards Order*, the FCC permits structurally separate subsidiaries to jointly market various services. This constitutes an enormous competitive advantage for the affiliated CLECs. GST's interexchange operations face the problem of joint marketing in Hawaii where GTE's customer service representatives ("CSR") suggest that a customer signing up for local service select GTE Long Distance as the customer's presubscribed interexchange carrier. The cost of CSRs is probably allocated entirely to the local service giving GTE Long Distance a competitive advantage since it does not have to pay for CSRs provided by GTE's regulated ILEC. GST has no doubt that similar joint marketing (and concomitant cost savings) would occur with respect to an ILEC's affiliated CLEC. This and other types of joint marketing (bill inserts, combined billing) provide a substantial economic benefit to the affiliated CLECs that are unavailable to GST.

These and other competitive advantages available to an unregulated CLEC affiliate cannot be ameliorated through any structurally separate subsidiary requirement. Thus, the FCC, rather than promoting competition, will further entrench the power of the existing dominant market participant -- the ILEC by relying solely on the provisions of its *Non-Accounting Safeguards Order*.

B. Sound Public Policy as Announced in the FCC's Open Video System Order Militates Against Establishment of ILEC-affiliated CLECs Until the ILECs Have Effectively Implemented § 251(c) of the Telecommunications Act

The primary objective of Congress in enacting the Telecommunications Act of 1996 was to increase facilities-based competition in the delivery of services that were previously delivered by a single dominant facilities-based provider.[29] In implementing the open video system requirements of the Telecommunications Act, the FCC was faced with a problem similar to the one that it is grappling with in the instant proceeding. There, the FCC had to determine whether incumbent cable operators would be permitted to establish open video system operations in their franchised cable territories.[30]

According to the FCC, the "underlying premise of Section 653 is that open video system operators would be new entrants in established markets, competing directly with an incumbent cable operator."[31] The FCC opined that open video system operators were exempted from many of the regulations applicable to franchised cable operators as an inducement to entry and to relieve them of regulatory burdens in their efforts to win customers from the entrenched

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[29] H.R. Conf. Rep. 458, 104th Cong., 2d Sess. 178 (1996); *Local Competition Order*, 11 FCC Rcd at 15,505.

[30] One of the primary distinctions between an open video system operator and cable operator is the exemption of the open video system operator from the franchising requirements of the Cable Communications Policy Act of 1984. 47 U.S.C. § 573(c) (1)(C).

[31] *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96-46, FCC 96-249, Second Report and Order, slip op. at ¶ 24 (Rel. June 3, 1996) ("OVS Order").

cable operator.[32] The FCC concluded that it would not be in the public interest to allow franchised cable operators to establish open video systems in their franchised territories, at that time, because they would then be free from regulation and such freedom would not be in the public interest.[33] However, a franchised cable operator that faced effective competition[34] would be authorized to establish an open video system in its franchised territory. In such cases, the harm to competition and consumers would not be possible since a customer could simply switch providers.

The logic of the FCC's determination in the *OVS Order* applies with equal force to the establishment of ILEC-affiliated CLECs. There is no fundamental distinction between the harm to competitors and consumers from allowing RBOCs to create CLEC affiliates and the harm that the FCC wished to stop by prohibiting cable operators from establishing open video system subsidiaries in their franchised cable territory. In both instances, new entrants would face formidable barriers in establishing a competitive foothold in mature markets. More significantly, consumer welfare would be harmed in the long-run from the absence of facilities-based competition. For these reasons, it is not in the public interest for RBOCs (or for that matter any ILEC) to operate a CLEC affiliate in its service territories.

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32 *Id.*

33 *Id.* at ¶¶ 24-25.

34 Effective competition is defined in 47 U.S.C. § 543(l) and basically requires the existence of a competing facilities-based multichannel video programming distributor. In this regard, the definition is not substantially different than the facilities-based competition requirement of § 271 of the Telecommunications Act.

C. Should the FCC Permit Establishment of CLEC Affiliates, the Requirements Must Apply to all ILECs and not just the RBOCs

The FCC requests comments on whether the structural separation requirements should apply to all ILECs.[35] GST strongly recommends that the FCC, should it adopt a structural separation requirement, impose the identical separation requirements on all ILECs.

As already noted, RBOCs are prohibited from offering in-region InterLATA service. Congress created a carrot-and-stick approach to the removal of that debarment. RBOCs are required to meet the 14-point checklist, i.e., not obstruct facilities-based competition, and, if they are compliant, they would be permitted into the promised land. Thus, the RBOCs have a substantial incentive to comply with their interconnection obligations. Similarly, they also would have an incentive to ensure that their CLEC affiliates would not receive preferential treatment in relation to other CLECs. If they provided preferential treatment, the FCC could determine that a RBOC's application to provide in-region InterLATA service be denied on § 271's public interest standard.

Other ILECs, such as GTE, are not subject to the same restrictions as the RBOCs with respect to the provision of in-region InterLATA service. In turn, they do not face the same incentives for complying with their statutory obligations under § 251(c) because there is nothing that the FCC can deny them with respect to the lines of businesses that can operate. Enabling these ILECs to establish structurally separate subsidiaries under a looser regulatory rein than that

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[35] NPRM at ¶ 98.

imposed on the RBOCs simply would exacerbate an already untenable position.[36] The ILECs would establish separate CLEC subsidiaries, provide them with preferential treatment in pricing, interconnection, etc., and the non-affiliated CLECs would be left to litigate these issues at the FCC, the state regulatory bodies, or in court. None of those alternatives are likely to promote the development of competition in the provision of advanced data services in such places as Hawaii, where GST is primary competitor against GTE. The only way to ensure that non-RBOC ILECs treat all CLECs equally, be it their own or an independent CLEC, is for the FCC to mandate their compliance with the structural separation requirements imposed on the RBOCs.

D. The FCC's Proposed Structural Separation Requirements do not Provide Adequate Protection to Independent CLECs

The FCC proposes that ILECs establish structurally separate CLEC subsidiaries. The affiliates would have to operate independently from the ILEC[37] and could not jointly own any switching facilities or the land or buildings in which such facilities are located. All transactions between the affiliate and the ILEC would be on an arms-length basis, in writing and made available for public inspection.[38] Rates for services provided by the ILEC to the affiliate,

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[36] In particular, GST has experienced substantial difficulties with GTE in obtaining interconnection as mandated by federal statute, state commission order, and contract. For example, in Hawaii, GST has been denied physical collocation of transmission equipment at several GTE tandem locations forcing GST to litigate space availability on a tandem-by-tandem basis.

[37] *Id.* at ¶ 96. The term "operate independently" has the same meaning as that term is used in the *Non-Accounting Safeguards Order*.

[38] *Id.*

to the extent that they are not the subject of a tariff, would be determined according to the rules set out in the *Accounting Safeguards Order*.[39] Separate books, records, and accounts must be maintained.[40] The affiliate and the ILEC must have separate officers, directors, and employees.[41] The CLEC affiliate cannot enter into any financial transaction in which a creditor has recourse to the ILEC parent.[42] The ILEC cannot discriminate or otherwise favor the affiliate in the provision of goods, services, facilities, information, or standards establishment.[43] Finally, the affiliate must obtain interconnection through tariffs or by negotiated agreement and the ILEC cannot favor the affiliate in the provision of network elements, facilities, interfaces, and operating systems.[44] The FCC contends that these requirements will ensure complete separation and provide for a level playing field between affiliated and unaffiliated CLECs. GST strongly disputes that conclusion and recommends that the FCC should impose additional requirements on the relationship between the ILEC and CLEC affiliate.

1. Prevention of Cross-Subsidies Through Tariff and Contract Filings

The FCC must establish rules that prevent any type of cross-subsidy between the

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39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

ILEC and the CLEC affiliate. While the rules in the *Non-Accounting* and *Accounting Safeguard Orders* ensure that the transactions between the affiliate and the ILEC are done at fair market value (when the service is not tariffed), this allows the ILEC to use good faith estimates of the fair market value.[45] GST does not believe that this will adequately protect unaffiliated CLECs. GST strongly recommends that all services provided to the CLEC by the ILEC be tariffed and thus subject to regulatory oversight including the suspension authority of state and federal regulators. Any other mechanism to review cost allocations does not provide sufficient protections against cross-subsidies.

If the FCC decides that it should not require the tariffing of all services provided to the affiliated CLEC, then the FCC should mandate that all contracts for services provided by the ILEC to its affiliated CLEC be filed publicly with the appropriate regulatory authorities. The contract filings then could be reviewed to ensure that the prices for goods and services were assessed at fair market value.[46]

2. Determinations of DSL-Qualified Loops

As already pointed out, local loops must be qualified before DSL service can be provided. To offer an advanced data service such as DSL, a determination must be made concerning which specific local loops in an ILEC market are already DSL-capable. This often

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[45] *See* 47 C.F.R. § 32.27(c).

[46] The ILECs could not contend that this requirement is onerous since the FCC proposes that all transactions be in writing and open to public inspection. NPRM at ¶ 96.

requires actual field-testing or inspection of the local loop thereby delaying a CLEC's ability to offer DSL service. To ensure that an affiliated CLEC does not gain any first-to-market advantage because it learns which loops are DSL-qualified before independent CLECs, the ILEC determination of loop qualification must be given simultaneously to all CLECs. In lieu of that coetaneous release of information, if an independent CLEC is told by the ILEC that loop qualification will take 30 days, the ILEC cannot or should not be allowed to provide a response to its affiliated CLEC's request in a shorter period of time. Similarly, if the ILEC-affiliated CLEC has access to real-time or virtually real-time information on which loops are DSL-qualified, independent CLECs must also have access to that same information. The FCC cannot permit the affiliated CLEC to have access to any information or systems that would permit it to be the first-to-market simply due to its relationship with the ILEC parent.

3. Availability of OSS

GST, like all CLECs, has numerous difficulties with the OSS of the ILECs. In particular, processes for taking and completing orders are often done manually not electronically. GST is particularly concerned that ILECs do not offer electronic processing of orders for DSL for its affiliated CLEC while still processing orders manually for independent CLECs. More importantly, the ILECs should not develop electronic ordering systems that contain proprietary technology to which only the CLEC affiliate would have access.[47] Similarly, the ILECs should

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[47] For example, Pacific Bell's electronic OSS for ordering utilizes proprietary software that makes it difficult for CLECs to utilize. *See, e.g.*, California Pub. Utils. Comm'n, (continued...)

not be allowed to develop OSS in conjunction with their CLEC affiliates; any such process must include the participation of all CLECs. If the FCC permits the establishment of affiliated CLECs that have any advantage in obtaining OSS services, then these affiliates will have a competitive advantage in being able to offer service sooner and at a lower cost than independent CLECs. GST recommends that the FCC make an explicit requirement that the level and cost of OSS provisioning must be identical for all CLECs.

4. Application of Open Network Architecture Rules

Interoperability is critical to interconnection and not just with respect to OSS. If an ILEC can grant its CLEC affiliate access to new network developments of the ILEC network prior to that of competing independent CLECs, the affiliated CLEC will have a competitive advantage in performing the needed engineering analysis and design, procuring the necessary equipment to provide interoperability, and installing the modifications to the network. This access would be particularly troublesome since the CLEC affiliate is unregulated and does not need to negotiate an interconnection agreement with unaffiliated CLECs.

The FCC faced the identical problem when it considered the appropriate structure for allowing RBOCs to provide enhanced services and adopted the open network architecture

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[47](...continued)
Telecomm. Div., *Initial Staff Report on Pacific Bell (U-1001-C) and Pacific Bell Communications Notice of Intent to File Section 271 Application for InterLATA Authority in California* 18-19 (Rel. July 10, 1998).

requirements ("ONA").[48] ONA requirements ensured that the RBOCs could not create proprietary changes in their networks that would prevent unaffiliated enhanced service providers from offering service over the RBOC network. GST opines that the FCC's rationale for adopting ONA requirements applies with equal force to the creation of ILEC-affiliated CLECs. GST recommends that the FCC mandate compliance with the ONA requirements for any ILEC that establishes an affiliated CLEC. This would ensure that unaffiliated CLECs and affiliated CLECs would obtain ILEC network development plans at the same time under the same terms and conditions.

5. Negotiation of Interconnection Agreements

Other issues of preferential timing may give an affiliated CLEC a competitive advantage. In particular, an affiliated CLEC may be able to negotiate an interconnection agreement for DSL service[49] more quickly than an unaffiliated CLEC. This would enable the CLEC to offer advanced data services before GST or some other independent CLEC. GST urges the FCC to adopt two recommendations to remedy this problem. First, while ILECs can complete negotiations with their affiliates at any time, the affiliated CLEC cannot offer service through its interconnection agreement until such time as an independent CLEC has attempted to negotiate, mediate, or arbitrate and,ultimately, entered into and signed an interconnection

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[48] *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988).

[49] GST's interconnection agreements, like those of most CLECs, do not contain provisions for interconnecting packet-switched networks.

agreement.[50] Second, ILECs, irrespective of whether they establish an affiliated CLEC or not, must be required to revisit existing interconnection agreements with CLECs so that they can be amended to include DSL or other packet-switching services. Absent this reopening, independent CLECs will have to await expiration of existing agreements or to negotiate new agreements while the ILEC commences offering the service. The FCC cannot permit the ILEC to have this first-to-market advantage.

VI. FCC Needs to Revise its Rules to Improve Collocation in ILEC Central Offices

As the FCC has recognized since 1992,[51] one of the critical elements for promoting competition in the local exchange market is physical collocation of CLEC equipment in ILEC central offices. The FCC's policy was codified in § 251(c)(6) of the Telecommunications Act. The FCC then adopted rules governing the collocation of equipment in its *Local Competition Order*.[52] These rules should have resolved the difficulties faced by CLECs in collocating their equipment. However, GST's experience shows that significant problems still remain with collocation.

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[50] This requirement should act as an incentive for the ILEC to negotiate an interconnection agreement with all deliberate speed and in good faith in order to avoid the delays associated with state regulatory commission arbitration proceedings. Independent CLECs would have no incentive to delay the negotiations through an arbitration proceeding because the ILEC, could, of course, simply eliminate its separate subsidiary and begin offering DSL service directly to the public.

[51] *Expanded Interconnection with Local Telephone Company Facilities*, First Report and Order, 7 FCC Rcd 7369 (1992).

[52] 11 FCC Rcd at 15,782-811 (1996).

On more than one occasion GST has been denied the ability to physically collocate, generally ILECs contend that the particular central office does not have any available space. And if GST or other CLECs are denied space for physical collocation so should the ILEC-affiliated CLEC. At that juncture, GST has two equally unpalatable choices. First, it can elect to litigate the dispute in an appropriate forum (either before the FCC or a state commission). This imposes substantial transaction costs on GST -- depleting scarce resources that GST could better devote to construction of its facilities-based network. Even if GST wins the litigation battle, it could lose the competitive war because resolution of the dispute delays the point when GST can offer service. In the alternative, GST can accept virtual collocation while it litigates the issue or awaits ILEC provision of space in its central offices which may take six months or more. Virtual collocation, as the FCC has recognized since its *Special Access Interconnection Order*, is not as procompetitive as physical collocation. GST must rely on the ILEC for maintenance services and the ILEC, not surprisingly, often places its own operational needs ahead of those of GST. Furthermore, when physical collocation becomes possible, GST must expend additional resources in converting from a virtual collocation environment to a physical collocation environment -- an expense that could have been avoided if the ILEC would have provided physical collocation when originally requested. Given this experience, GST believes that it is necessary to adopt strengthened national collocation standards.[53] Only with

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[53] There is little doubt that the FCC has the authority to adopt national collocation standards. The FCC's collocation rules and their applicability to state commission approval of (continued...)

strong national collocation rules will GST be able to focus its resources on building its network, providing service, and vigorously competing with ILECs -- the goals envisioned by the authors of the Telecommunications Act. These strong national rules also have the additional benefit of complying with another statutory objective of the Telecommunications Act -- removal of barriers to entry by small businesses.[54]

A. Enforcement of National Collocation Rules

GST has three options when it seeks to litigate a collocation dispute. First, it can file a complaint at the FCC, either under the normal complaint procedures or through the recently-adopted accelerated complaint processes.[55] Second, GST can seek redress through state commissions since approval of the interconnection agreements constitutes enforceable orders of the state regulatory bodies. Third, GST can seek redress in federal court under the Communications Act and pendent state contract claims.

Of the three options, GST would prefer to utilize state commissions since they would be most familiar with the central offices of the ILECs that they regulate. However, GST cannot always rely on state commissions for a fair and quick resolution of its disputes. Some state commissions, such as the Washington Utilities and Transportation Commission, have

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[53](...continued)
interconnection agreements were upheld in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 818 (8th Cir. 1997), *cert. granted sub. nom., AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

[54] *See* 47 U.S.C. § 257.

[55] CLECs can obtain enforcement of interconnection obligations by the filing of complaints at the FCC. *Local Competition Order*, 11 FCC Rcd at 15,564.

adopted specific and accelerated procedures for resolving interconnection disputes.[56] Other states, such as California, have extremely cumbersome administrative procedures that would not lead to a timely resolution of collocation disputes.[57] Finally, other state commissions appear to be biased in favor of the CLECs or have an animus to FCC rules or a combination of both. Therefore, GST is not particularly sanguine about obtaining enforcement of collocation rules in a consistent manner at the state level.

GST recommends that the state commission be the primary forum for resolving collocation disputes. The state commission clearly will be the most convenient forum[58] but only if it has some special procedure for resolving interconnection and collocation disputes in a timely manner. If a state commission does not have such a procedure, the FCC should resolve the dispute under its accelerated complaint process. This election of the speediest forum will ensure that CLEC disputes are resolved in no more than 60 days which is still too long in the rapidly

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[56] Wash. Admin. Code § 480-09-350 (establishing rules for petitions for enforcement of interconnection agreements).

[57] Three years after initiating a rulemaking and investigation on establishing rules for competitive entry in the local exchange market and nearly two years after the FCC authored its rules on local competition, the CLEC industry awaits a decision by the California Commission on such basic issues as costs for obtaining OSS and the type of OSS that ILECs will make available to CLECs.

[58] *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981); *Koster v. Lumbermen's Mut. Cas. Co.*, 330 U.S. 518, 527 (1947) (forum non conveniens rule enables federal courts to transfer litigation to more appropriate venue for convenience of parties or more efficient adjudication of dispute).

changing telecommunications marketplace but shorter than the six months it often takes ILECs to find space for CLEC collocation.

B. Changes Must be Made to the Collocation Rules that will Improve CLEC Network Development and Ensure that all CLECs Compete on a Level Playing Field

Current FCC rules prohibit the collocation of switching equipment in the ILEC central office because that equipment provided functions other than purely interconnecting with the ILEC network or providing the CLEC with access to unbundled network elements.[59] However, technological advances, as the FCC correctly notes, are making the distinctions between switching equipment and other devices increasingly irrelevant.[60] GST urges the FCC to adopt its tentative conclusion and permit CLECs to collocate any equipment related to the provision of telecommunication services in the ILEC central office. GST then will be able to engineer its network in the most efficient manner possible using the latest electronic combinations of equipment. In turn, this will conserve scarce GST capital that can be utilized in other means -- to expand its facilities-based network and provide true competition to the ILECs.

Once the equipment is collocated, some ILECs often impose restrictions on CLEC ability to interconnect its own equipment collocated in the central office or interconnect that equipment with other CLECs. Despite the fact that CLECs interconnecting with each other might have equipment located only a few feet from each other in an ILEC central office, the

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[59] NPRM at ¶ 127 & n.236.

[60] *Id.* at ¶ 128.

ILEC restriction forces the CLECs to expend resources (both technical and financial) in finding another point at which to interconnect. The only logical reason for the imposition of this requirement is to increase the cost of CLEC service. This restriction becomes even more problematic should the ILEC allow its CLEC affiliate to cross connect equipment in the central office or interconnect with other CLECs. GST urges the FCC to remove this arbitrary restriction and allow all CLECs to cross connect their own equipment or interconnect with other CLECs collocated in the ILEC central office for any purpose and without delay. ILECs may place reasonable restrictions on these cross-connects and interconnects but only as they relate to safety requirements and electrical code compliance.

Ideally, the ILECs should not have to impose any other restrictions on the collocation of equipment. However, GST and other independent CLECs do not operate in an ideal world. GST recognizes that ILEC central offices contain real space limitations.[61] GST recommends that the FCC permit ILECs to impose reasonable restrictions on the size of equipment that can be collocated in a central office. These size restrictions must apply equally to all CLECs -- including any CLEC affiliated with the ILEC. These size restrictions will ensure

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[61] GST's complaint about ILEC space limitations is not with an actual space limitation but artificial space limitations in which the ILEC contends that insufficient space exists for physical collocation when that simply is not the case. GST concurs with the FCC that CLECS denied collocation space should be permitted to examine the central office floor plans, or in lieu thereof, be permitted to perform an in-person examination of the central office to determine whether an actual lack of space exists.

that no CLEC, but especially an affiliated CLEC, can collocate sufficient amounts of large equipment that eliminates available space for collocation by other CLECs.

A necessary corollary to collocation of switching equipment is the requirement that ILECs do not develop proprietary network technologies that make it impossible or extremely costly for CLECs to collocate advanced switching or other equipment in ILEC central offices. The FCC should impose an ONA requirement on ILECs to ensure that CLECs can obtain and collocate equipment that will operate with the ILEC network.

Nor should the ILECs be able to impose restrictions on independent CLECs limiting the equipment that can be collocated in their central offices to that equipment which satisfies Bellcore or other national standards if the ILEC or its affiliates are permitted to install equipment that does not meet these standards. This may give the ILEC or its affiliated CLEC a competitive advantage (the cost of equipment that does not meet standards may be less expensive or create interoperability problems with the ILEC network). At a minimum, the FCC should require that ILECs list the standards for and the types of equipment that can be placed in the ILEC central office. The list would cover the ILEC, affiliated CLECs and independent CLECs. A better solution would be for the FCC to adopt GST's recommendation of imposing ONA requirements on all ILECs so that network engineering and planning becomes transparent for the CLEC industry rather than a guessing game between independent CLECs and ILECs.

GST pays ILECs to build collocation cages for security and network protection. These collocation cages often have more space in them than GST requires at the time of initial

collocation. However, at some future time, GST may require more space within the collocation cage built for GST and paid for by GST. Yet, GST often has to pay additional "preparation" fees for use of what is essentially its own space within the central office. The FCC should prohibit ILECs from charging these "preparation" fees and allow the CLECs with additional space in their collocation cages to utilize all of that space without any additional charges.[62]

C. The FCC must Adopt Rules that Maximize Utilization of Space within Central Offices but Adequately Protect the Security of CLEC Equipment

The FCC recognizes that there are real constraints on the available space in ILEC central offices and expansion of those offices cannot be accomplished in a timely manner for CLECs to compete in the marketplace.[63] The FCC suggests that any of three alternatives -- shared collocation cages with or without locked cabinets, elimination of minimum cage size, and cageless collocation -- will reduce the central office capacity problem. GST concurs with the FCC that alternative arrangements to the standard collocation cage should be permissible.

Of the three alternatives, GST prefers those that provide it with optimal security from the ILEC and other CLEC competitors. GST has no problem sharing a collocation cage or other enclosure with another carrier as long as GST's equipment is securely separated from the

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[62] Of course, to the extent that ILECs incur additional costs associated with the placement of more equipment within GST's collocation cage, they will be able to recoup those actual costs.

[63] *Id.* at ¶ 137.

other carriers equipment in the cage or enclosure.[64] In fact, manufacturers are offering equipment with locked cabinets or multiple locked slots so that carriers can share cabinets without concern about their network security.

If GST needs a collocation cage that is 5 feet by 5 feet by 5 feet, GST sees no reason why it has to pay an ILEC to prepare a collocation cage twice that size. Such an arrangement can be particularly problematic when an ILEC constructs a new central office or expands its existing central office and builds a collocation cage much larger than necessary to accommodate the request of its affiliated CLEC. Independent CLECs then will be denied space for physical collocation and then will have to utilize virtual collocation -- a method that has substantial competitive drawbacks. The FCC should prohibit ILECs from mandating that collocation cages be of certain minimum sizes or from allowing its CLEC affiliate to reserve more space than absolutely necessary for collocating its equipment. Absent these restrictions, unaffiliated CLECs will not have a reasonable probability of obtaining physical collocation space.

GST also supports the rights of other CLECs to utilize cageless collocation. While GST may not want to utilize this service due to potential security issues, GST sees no reason why other CLECs should be denied the ability to collocate their equipment in the ILEC central office without cages. And in some situations, GST may want the ability to utilize

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[64] To the extent that GST enters into an interconnection arrangement with another CLEC that involves sharing the collocation cage space, GST will negotiate the appropriate security arrangements with that CLEC.

cageless collocation. Therefore, the FCC should mandate that cageless collocation be permitted in ILEC central offices.

D. Reopening of Interconnection Agreements

As GST has already noted, its interconnection agreements generally do not cover packet switching technologies. GST already has recommended that the FCC permit reopening of the interconnection agreement negotiation process to take account of these new services. This fresh look is particularly important since any ILEC-affiliated CLEC will be negotiating interconnection agreements under these new rules and the independent CLECs will be operating under outmoded interconnection agreements. GST sees no reason to allow only affiliated CLECs to obtain the benefit of new national collocation rules. Therefore, GST recommends that the FCC authorize all CLECs a 270-day period to negotiate new collocation arrangements in their interconnection agreements that incorporate these new national standards.[65] This 270-day period would begin upon the completion and execution of an ILEC-affiliated CLEC agreement containing terms and conditions for access to DSL-qualified network elements and collocation.

VII. The FCC must Ensure that CLECs have Access to DSL-Qualified Unbundled Loops on Terms and Conditions that Do Not Provide a Competitive Advantage to the ILEC or ILEC-affiliated CLEC

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[65] GST does not believe this process will be particularly time-consuming especially if the FCC adopts the recommendation that no affiliated CLEC can offer service until an unaffiliated CLEC has an interconnection agreement that covers these new rules. *See supra* Part V.D.6.

GST has expended substantial resources in developing its facilities-based network throughout the western United States. However, GST, like every other CLEC, cannot hope to match the ubiquity of the ILEC's local loop. Congress and the FCC recognized that a competitive level-playing field would not be possible without access to unbundled local loops.[66]

A. CLECs Need Non-Discriminatory Access to DSL-Qualified Unbundled Loops or Unbundled Sub-Loops

Access to the unbundled local loop is a necessary element to the ability of GST and other CLECs to offer service -- especially DSL. In most cases, GST's facilities-based network is fiber-based. DSL is a metallic-based technology that is incompatible with fiber technology. Therefore, simple interconnection with the ILEC network is insufficient for GST to offer DSL broad-based and efficiently-deployed advanced data services. GST and other CLECs must obtain timely and nondiscriminatory access to unbundled DSL-qualified loops to compete with the ILEC or an ILEC-affiliated CLEC.

GST concurs with the FCC tentative conclusion that a CLEC which requests access to unbundled loops free of loading coils, bridged taps, amplifiers, or other electronic impedances, must be given access to those DSL-qualified loops.[67] Furthermore, GST does not believe that there is any situation in which technical limitations prevent an ILEC from providing a CLEC with DSL-qualified loops.

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66 *See* 47 U.S.C. § 251(c)(3); *Local Competition Order*, 11 FCC Rcd at 15,689-90.

67 NPRM at ¶ 152.

Not only must there be access but it must also be nondiscriminatory. Any type of DSL loop that the ILEC provides to itself or an affiliated CLEC also must be provided to independent CLECs. Any other result violates the Telecommunications Act prohibition against an ILEC providing to itself superior network elements than that provided to competitors.[68]

GST, as it has in these comments with respect to collocation and the establishment of affiliated CLECs, strongly recommends that the FCC require ILEC preparation of ONA plans for DSL loops. The ONA requirements will ensure transparency in network planning to all competitors and prevent discrimination based on some competitors, particularly affiliated CLECs, obtaining earlier access to ILEC network data.

The ILEC should not impose restrictions on GST's use of the unbundled loop. If GST wishes to use the unbundled loop for providing voice or data or a combination of both services, GST should be permitted to do so. This would give GST the same decisionmaking authority over the local loop that the ILEC has concerning the services that it will deliver over the unbundled loop. Any other result would amount to the ILEC providing itself with preferential network facilities in violation of § 251(c)(2) of the Telecommunications Act.

GST also should be permitted to share that unbundled loop with another carrier or carriers. For example, GST may be interested in providing data transmission over some of the frequencies in the DSL unbundled loop. The other available frequencies then can be used by another carrier or carriers to provide data transmission or voice transmission. GST should be

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[68] *See* 47 U.S.C. § 251(c)(2)(C).

permitted to enter into contractual arrangements with other carriers who wish to share GST's unbundled loop. The contracts will address various issues including which party to the agreement would manage the frequency division multiplexing equipment used for DSL service. Absent a contractual provision for managing the frequencies, the party that first obtained the unbundled loop would control the frequency division multiplexing.

Nondiscriminatory access also means that GST has the ability to resell at wholesale rates, the unbundled loop or the ILEC DSL service. The ILEC must ensure that the bit rate speed available for resale by GST and other unaffiliated CLECs is the same bit rate speed that it provides itself for retail sales or grants to an affiliated CLEC.

B. Competitive Equality Requires that the FCC Provide for Sub-Loop Unbundling

Most ILECs use remote concentration devices to collect individual copper lines for interconnection with their fiber-optic trunks for transmission to the central office. As already noted, DSL services are metallic-based and incompatible with fiber-optic trunks. A direct connection between the metallic loop and the fiber trunk is not possible. To overcome this problem, ILECs offering DSL service generally place a digital subscriber line access multiplexer ("DSLAM") at the remote concentration device.

Bluntly put, if GST were to obtain unbundled loops from the remote concentration device to the end-user customer it would be impossible to provide service. The cost for GST to

place its own DSLAMs at all remote concentration points is simply prohibitive.[69] Thus, access to the remote concentration device, while potentially useful in some circumstances, simply does not provide a practical means for GST to offer DSL service through interconnection with the ILEC network.

To ensure that competition will occur in the provisioning of DSL service, the FCC must mandate that the DSLAM itself must be an unbundled network element and that GST can gain access to the ILEC DSLAM at the remote concentration point. This will enable GST to connect our fiber to the DSLAM at the remote concentration point.

Access to the DSLAM at the remote concentration device also is insufficient for GST to efficiently provision DSL service. GST also must be able to purchase, as an unbundled network element, access to the ILEC multiplexer at the central office. If GST can obtain access to the multiplexer, GST then could interconnect its fiber optic rings at the ILEC central office multiplexer and provide DSL service without accessing the DSLAM at the remote concentration device. This represents the most efficient and economical method for GST to provide DSL service. GST urges the FCC to require the unbundling of ILEC central office multiplexer or other equipment that it uses in the central office to provide DSL service.

C. National Standards For Loop Unbundling and Connecting Electronic Equipment to those Loops

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[69] Congress recognized that it would be impossible in the foreseeable future for CLECs to replicate the ubiquity of the ILECs' networks. *See* Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996). This rationale for authorizing interconnection also applies to the placement of DSLAMs throughout an ILEC network.

GST already has noted that uniform national standards reduce the costs associated with interconnection and allow it to focus resources on network development. Without national standards, ILECs may develop proprietary DSL loop technologies for unbundling and interconnection. In turn, GST and other CLECs that operate in multiple states will not be able to procure equipment in volume but will have to obtain ILEC-specific equipment. This will increase CLEC costs, reducing their competitiveness as the FCC notes.[70] The only way to prevent the development of proprietary standards is for the FCC to implement national technical standards for unbundling of local loops and the attachment of electronic equipment at the central office.

D. Any Resolution of the Spectrum Interference from DSL Loops must not Disadvantage Independent CLECs

Depending upon the power and, therefore the bit-rate transmission speed, DSL loops can create interference with other DSL loops or even plain old telephone service. This crosstalk can be combatted in one of two ways. First, sufficient space can be placed between the DSL loops so that the interference problem is eliminated. In the alternative, limits can be placed on the power (and therefore the bit rate of access) for each DSL loop. Of the two approaches, GST opines that power restrictions will be the more competitively neutral solution.

If the FCC adopts a spacing requirement, then those carriers that have first access to conduits, risers, etc. will be able to provide DSL service and later carriers will not. More

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[70] NPRM at ¶ 163.

importantly, to the extent that the ILEC or an ILEC-affiliated CLEC obtains space in the conduits and maximizes bit rates (and therefore power), it could eliminate a substantial number of competitors from gaining access to the conduit. In short, spectrum management problems may limit the number of available DSL lines given the available space. Independent CLECs will be at a competitive disadvantage because they will not be able to obtain DSL lines for their customers. Therefore, GST strongly recommends that the FCC establish power limitations on DSL-qualified loops.[71] Technological developments should ensure that DSL bit rates can be increased without necessarily increasing the amount of power needed for DSL transmissions.[72]

GST opines that the FCC should not overlook quality of service in the quest for unbridled speed. Unrestricted power limits also will affect the quality of service. By limiting power along DSL loops, the FCC will ensure that all end-users, not just those who obtain the service first, will obtain high-quality transmissions with little if any crosstalk. As technology improves, the FCC can revisit this issue.

If the ILEC can offer access speeds between its central office and the customer of 1.5 Mbps over a DSL line, a competing CLEC must be able to gain access at the same bit rate.

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[71] GST does not believe that the drops in bit rate access will be particularly significant for the vast majority of customers. Almost all of them still will see dramatic increases in the bit rate speeds for Internet access.

[72] In fact, the power restrictions should spur the development of new modulation technologies to increase the bit rate access while satisfying regulatory objectives. GST expects that DSL technology will undergo the same evolutionary process that modems for personal computers have shown.

An ILEC or its CLEC affiliate will have an obvious competitive advantage if it can provide greater access speeds than an independent CLEC since the primary selling point of DSL service is speed.[73] Therefore, the FCC must ensure that an independent CLEC, such as GST, must be able to offer its customers the same bit rate access that the ILEC or its CLEC affiliate can offer.

VIII. The FCC Must Issue a Further Notice of Proposed Rulemaking

This NPRM, like many of the FCC's notices of proposed rulemaking, is extremely lengthy with hundreds of questions. Commenting parties could devote an entire comment filing to just one question, especially those related to the development of technical standards. Instead of the FCC identifying the problem, designing potential solutions to the problem, and then seeking public comment as required by the Administrative Procedure Act,[74] the FCC in this NPRM is essentially asking the regulated community to design the solutions to the identified problem of how ILECs can offer advanced data services. In short, the FCC is shifting burdens that Congress delegated to it onto the regulated community.

GST simply does not have the resources, legal and technical, to expend on analyzing numerous theoretical questions posed by the FCC, determine a range of possible

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[73] An ISP customer of the ILEC that can promise the ISP end-user access 768 kbps for $50 per month will have a distinct competitive advantage over an ISP customer of a CLEC that can only promise its end-user customer access at 256 kbps for $50 per month. ISP customers will gravitate toward those that offer better service (faster access) for the same price. As the end-user customers seek other ISPs, the ISPs will seek solutions to reselling faster access and they will do so by seeking to obtain service from the ILEC or its affiliate.

[74] *See, e.g., Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 (1986); *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

solutions, analyze which solutions will be most beneficial to GST, and then cogently report these findings in comments within the seven weeks provided by the FCC. Nor does GST have the resources to devote to an analysis of the comments filed in this proceeding to determine whether any particular standard mentioned in the initial round of comments and subject to possible adoption by the FCC could create potential problems for GST.[75] Finally, GST, unlike many ILECs and larger IXCs, does not have a Washington, DC office whose personnel are dedicated to meeting with and presenting, on an ex parte basis, a particular point of view to the Common Carrier Bureau staff and the Commissioner's legal advisors.

GST appreciates the FCC's significant regulatory responsibilities and limited resources. However, Congress in enacting the RFA in 1980 and strengthening it in 1996 with the passage of the Small Business Regulatory Enforcement Fairness Act mandated that, as between federal agencies and small businesses, the federal government was to bear the burden of regulatory analysis. GST opines that the FCC, to accomplish the mandates of Congress, particularly concerning effective participation by small business in the rulemaking process,[76] should issue a subsequent rulemaking notice on those issues that require the promulgation of specific technical standards rather than simple framework regulations. For example, GST would appreciate the opportunity to comment on any FCC proposal concerning power limitations or

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[75] This exercise in contingency analysis may intrigue Defense Department planners. However, GST's engineers have to deal with real-life situations such as ensuring proper functioning of GST's network. They do not have the time for idle regulatory speculation.

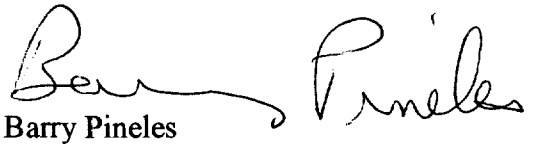
[76] *See* 5 U.S.C. § 609.

conduit spacing requirements of DSL-qualified loops. In contradistinction, GST does not feel it is necessary for further comment on issues such as permitting collocators to use the entire space in their collocation cage without incurring additional fees.

IX. Conclusion

GST appreciates the FCC's desire to ensure that Americans have access to advanced wireline services, especially data services. GST is at the forefront of developing an integrated network solution for providing voice and data transmission services to its customers, especially small and medium-sized businesses. However, the NPRM raises the distinct possibility that the efforts of the Telecommunications Act to level the playing field between ILECs and competitors will be undone in a misguided effort to allow ILECs, and in particular, the RBOCs, to provide in-region InterLATA data services before they have fully complied with their obligations under the Telecommunications Act of 1996. GST strongly urges the FCC to prevent ILECs from gaining any more of a competitive advantage than they already have in the provision of advanced data services by adopting the recommendations made in these comments.

Respectfully submitted,



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